

No. 14-2299

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IN THE  
**UNITED STATES COURT OF APPEALS**  
**FOR THE FOURTH CIRCUIT**

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UNITED STATES OF AMERICA *ET AL.*, *EX REL.* STEVEN MAY AND ANGELA RADCLIFFE,  
*Plaintiffs-Appellants,*

v.

PURDUE PHARMA L.P. AND PURDUE PHARMA INC.,  
*Defendants-Appellees.*

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On Appeal from the United States District Court for the Southern District of West  
Virginia, Civil Case No. 5:10-1423 (Hon. Irene C. Berger)

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**RESPONSE TO DOCKETING STATEMENT**

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On December 12, 2014, pursuant to this Court's December 1, 2014  
Docketing Notice, relators Steven May and Angela Radcliffe filed a Docketing  
Statement in the above-captioned matter. Defendants Purdue Pharma L.P. and  
Purdue Pharma Inc. (collectively "Purdue") offer the following three points in  
response:

1. On page 3, in the box titled "Issues," relators present the issue on  
appeal as follows:

Did the district court err when it dismissed the case on the ground that the  
public disclosure bar precluded the action?

In addition to concluding that it lacked subject matter jurisdiction based on the application of the False Claims Act's (FCA) public disclosure bar, the district court held that, if the bar did not preclude the action, the court would nonetheless dismiss the complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 9(b). *See* D. Ct. Dkt. No. 210, at 24-25. The district court also held that further attempts to amend the complaint would be futile. *Id.* at 24. If this Court were to disagree with the district court's public-disclosure ruling, it would need to address these independent and sufficient grounds for dismissal of the complaint.

2. On page 2, the Docketing Statement requests the “[c]ase number of any pending appeal in same case.” Purdue has petitioned for Supreme Court review of this Court's prior decision in this case, *United States ex rel. May v. Purdue Pharma L.P.*, 737 F.3d 908 (4th Cir. 2013), and its petition for certiorari, No. 13-1162, remains pending. Purdue's petition presents the following questions for review: (1) whether the FCA's pre-2010 public disclosure bar, 31 U.S.C. § 3730(e)(4) (2009), prohibits a claim only if the plaintiff's knowledge “actually derives” from prior disclosures; (2) whether the FCA's first-to-file bar, 31 U.S.C. § 3730(b)(5), precludes a later FCA claim only so long as an earlier claim based on the same facts is still pending; and (3) whether the Wartime Suspension of Limitations Act (WSLA), 18 U.S.C. § 3287, applies to toll the FCA's statute of limitations in a civil action brought by a private party.

3. On page 2, the Docketing Statement requests the “identification of any case pending in this Court or Supreme Court raising similar issue.” In addition to Purdue’s pending petition for certiorari in this case (discussed above), the Supreme Court granted certiorari in *Kellogg Brown & Root Services v. United States ex rel. Carter*, No. 12-1497 (U.S.), and has set oral argument for January 13, 2015. *Carter* presents the second and third questions presented in Purdue’s petition. If the Supreme Court reverses either of this Court’s holdings in *Carter*, relators’ claims here would be largely foreclosed by the FCA’s statute of limitations or entirely foreclosed for lack of subject matter jurisdiction. As reflected in the District Court’s Memorandum and Order (Dkt. 210, at 5), Purdue has preserved both of these additional grounds for dismissal.

Respectfully submitted,

s/ Christopher E. Babbitt

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December 22, 2014

No. 14-2299

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**CERTIFICATE OF SERVICE**

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I, Christopher E. Babbitt, counsel for defendants-appellees Purdue Pharma L.P. and Purdue Pharma Inc. (“Purdue”), hereby certify that on this 22nd day of December 2014, I electronically filed the foregoing Response to Docketing Statement with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit using the appellate CM/ECF system. Participants who are registered CM/ECF users (either as entities or through individual attorneys representing those offices) will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have sent the foregoing document by United States Postal

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December 22, 2014